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Nos. 78-119 and 78-139

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, ET AL., PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL., PETITIONERS
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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PUGET SOUND GILLNETTERS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

Two petitions for a writ of certiorari have been filed seeking review of three separate decisions entered in the same controversy. The State of Washington (Pet. No. 78-119) seeks review of the decision of the court of appeals in the consolidated cases of *Puget Sound Gillnetters Association* v. *United States District Court for the Western District of Washington* and *United States* v. *Washington* (hereafter the "Washington Fishery case"),

and also seeks review of the separate decision of the court of appeals in *United States* v. *Washington* (hereafter the "International Fishery case"). The Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association (Pet. No. 78-139) seek review of the decision of the court of appeals in the Washington Fishery case, *supra,* and also seek review, pursuant to Rule 20 of the Rules of this Court, of the decision entered by the district court on June 6, 1978, in *United States* v. *Washington,* Civ. No. 9213 (W.D. Wash.) (hereafter the "1978 Enforcement Order").

The United States submits this single response to both petitions.

OPINIONS BELOW

The opinion of the court of appeals in the Washington Fishery case (Pet. App. A-1 to A-28)[1] is reported at 573 F. 2d 1123. The opinion of the court of appeals in the International Fishery case (Pet. App. A-29 to A-33) is reported at 573 F. 2d 1118. The findings of fact, conclusions of law, and preliminary injunction of the district court issued upon entry of the 1978 Enforcement Order (Pet. No. 78-139, App. C-1 to C-13) are unreported.

JURISDICTION

The judgments of the court of appeals in the Washington Fishery case and the International Fishery case were entered on April 24, 1978. The 1978 Enforcement Order was entered by the district court on June 6, 1978, and a notice of appeal to the court of appeals was filed on July 19, 1978. The petition for a writ of certiorari

[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 78-119.

in No. 78-119 was filed on July 21, 1978, and the petition in No. 78-139 was filed on July 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether treaties guarantee Indian tribes in the State of Washington an opportunity to harvest up to one-half of any run of fish that normally would pass through the tribes' usual and accustomed off-reservation fishing stations, with adjustments for tribal subsistence and ceremonial fishing (both petitions).

2. Whether, in light of the State of Washington's failure to adopt regulations permitting Indian fishermen to harvest their treaty share of fish, the district court properly exercised its discretion by allocating the salmon harvest equally between treaty and non-treaty fishermen (with adjustments for tribal subsistence and ceremonial fishing) and enjoining the State from interfering with the court's allocation (both petitions).

3. Whether, in light of the State of Washington's unwillingness or inability to prevent its non-treaty fishermen from encroaching on the fishing rights of treaty Indians, the district court properly enjoined state-licensed non-treaty fishermen from harvesting salmon in excess of their allocated share (both petitions).

4. Whether the State of Washington must manage and regulate its fisheries in such a manner as to ensure that federally-guaranteed treaty fishing rights are protected, notwithstanding the absence of any state statute specifically authorizing enforcement of Indian fishing rights (both petitions).

5. Whether this Court should grant certiorari before judgment in the court of appeals to review an order of the

district court which presents the same issues that are before this Court in the petition for review of the Washington Fishery case but which constitutes the enforcement order presently in effect (Pet. No. 78-139 only).

6. Whether the court of appeals correctly concluded that the matters at issue in the International Fishery Case are now moot (Pet. No. 78-119 only).

TREATIES INVOLVED

The treaties involved in this case are the Treaty of Medicine Creek (10 Stat. 1132), the Treaty of Point Elliott (12 Stat. 927), the Treaty of Point No Point (12 Stat. 933), the Treaty with the Makahs (12 Stat. 939), the Treaty with the Yakimas (12 Stat. 951), and the Treaty of Olympia (12 Stat. 971). With immaterial variations, these treaties each provide (10 Stat. 1132-1133):

> ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows * * *.
>
> ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; * * *.
>
> ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *.

STATEMENT

1. *Background of the federal litigation.*

The present petitions reflect the continued unwillingness of the State of Washington and its non-treaty fishermen to accept the validity of the 1974 decision of the federal district court in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash.), affirmed, 520 F. 2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086. That case was brought in 1970 by the United States, on its own behalf and as trustee for several Indian tribes, to compel the State of Washington to comply with treaties guaranteeing off-reservation fishing rights to the Indian tribes.[2] After extensive pretrial development of the evidence and an 18-day trial, the district court entered detailed findings of fact. 384 F. Supp. at 348-399. Among other things, the court found that the treaty tribes fished for trade, as well as subsistence and ceremonial purposes, at the time the treaties were made. *Id.* at 350-353. In negotiating the treaties, the tribes were willing to relinquish their claims to large areas of land and restrict their residence to reservations. But the tribes insisted, and the United States agreed, that they could continue to fish

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[2]In a series of cases that are roughly contemporaneous to this litigation, it has been held that the State may regulate the tribes' treaty fishing in the interest of conservation, *Puyallup Tribe* v. *Department of Game of Washington,* 391 U.S. 392, 398 ("*Puyallup I*"); that conservatory measures may not discriminate against tribal net fishing, *Department of Game of Washington* v. *Puyallup Tribe,* 414 U.S. 44, 48 ("*Puyallup II*"); that where unrestricted fishing would lead to destruction of the species, the number of fish that may be caught "must in some manner be fairly apportioned between Indian net fishing and non-Indian * * * fishing," *ibid.;* and that an allocation to the Indians of 45 percent of the natural run of fish entering the river was appropriate. *Puyallup Tribe* v. *Department of Game of Washington,* 433 U.S. 165, 177 and n. 18 ("*Puyallup III*").

at their usual and accustomed stations off the reservations, although they would have to share these fisheries with the citizens of the Territory. *Id.* at 355-357.

The court found that, as the number of non-Indian fishermen grew and the State adopted conservation measures, those measures favored non-Indian fishermen to the detriment of the treaty fishermen. The court found that "[e]nforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians." *Id.* at 388. The court found that tribal fishermen had avoided using some usual and accustomed fishing stations because of state enforcement actions, 384 F. Supp. at 358, and that the Washington Departments of Fisheries and Game had seized Indian boats and nets, and fish caught by Indians, without notice to their owners and without judicial proceedings, *id.* at 388. Finally, the court found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the plaintiff tribes' usual and accustomed fishing places to which the treaties apply." *Id.* at 393.

The district court held that, under the several treaties at issue, each of the plaintiff tribes had reserved to itself and its members a right to fish at all usual and accustomed grounds and stations "in common with all citizens of the Territory." *Id.* at 406. The court determined that numerous state regulations discriminated against or

improperly limited Indian fishing and were thus "in violation of the treaty-secured rights of the plaintiff tribes and their members." *Id.* at 413. The court further determined that injunctive relief was necessary to protect the tribal treaty rights from a "continuation and repetition" of state interference. *Ibid.*

In its injunction, the court directed the State "to take all appropriate steps" within its authority to control non-Indian fishing at places other than the usual and accustomed fishing stations of the treaty tribes so that the tribes will receive "an equal sharing of the [fishing] opportunity * * *." *Id.* at 344.[3] In response to requests by both the United States and the State,[4] the court established a formula for determining the maximum extent

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[3]Substantial numbers of fish are caught by non-treaty fishermen in marine areas before they enter the rivers where accustomed Indian fishing stations are located. 384 F. Supp. at 344.

[4]The Washington Department of Game contended that the treaties afforded the Indians no rights not enjoyed by other citizens. The Washington Department of Fisheries, on the other hand, recognized that the treaties provided the tribes with special fishing rights at their usual and accustomed places and that the tribes were entitled to a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries Pre-Trial Br., p. 2; Final Pre-Trial Order, pp. 137-138). The Department of Fisheries requested the court "to quantify the treaty right by reference to an objective, definite standard" to be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of the State of Washington in the case area" (Fisheries Pre-Trial Br., pp. 8, 22; see also p. 2). In its post-trial brief (p. 36) and in argument in the district court (Tr. 4384), the Department proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the tribes, with the remaining two-thirds to be divided between non-Indian sport and commercial fishermen.

The United States argued that non-Indian fishing should be regulated in such a manner as to permit the tribes the opportunity to catch 50 percent of the harvestable fish (Respondent's Post-Trial Br.,

of the tribes' entitlement. The formula provided basically that the tribes are entitled to the opportunity to fish for up to one-half of any run of fish that normally would pass through their usual and accustomed fishing stations, with various adjustments for fish caught beyond state jurisdiction and for subsistence and ceremonial fishing. Fish caught by the Indians within their reservation were not to be included in the tribes' one-half share of the run. *Id.* at 343-344.

The court of appeals affirmed the judgment and orders of the district court. 520 F. 2d 676. The court held that the fishing rights that the tribes had reserved when they entered into the treaties had been rendered "nugatory" by the State's pattern of regulation. *Id.* at 685. The court reviewed and approved the equitable relief granted by the district court and noted that (*id.* at 687):

> [t]he district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public.

The court of appeals remanded the case to the district court for it to exercise a continuing jurisdiction. *Id.* at 693. This Court denied the petition for a writ of certiorari filed by the State of Washington. 423 U.S. 1086.

2. *The parallel state litigation.*

Implementation of the district court's decree has proved difficult. The State of Washington has not discharged its responsibilities under the decision, and non-treaty fishermen have continued to fish throughout the area in

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pp. 81-84). The United States rejected the Department of Fisheries' proposed one-third/two-thirds allocation as having no connection with the intent or language of the treaties.

disregard of state regulations and the orders of the district court.[5] In each fishing season since the decision, the United States and the tribes have been forced to return to the district court seeking further orders to require compliance with the district court's initial decision. At the same time, non-Indian fishermen have instituted numerous suits against the State of Washington in the state courts, seeking declaratory and injunctive relief against implementation of state regulations that limit non-treaty fishing to protect treaty rights in compliance with the federal court's mandate. The state courts have consistently granted such relief, holding not only that the regulations are in violation of state law, but that the federal district court's interpretation of the Indians' treaty rights was erroneous and unconstitutional.

Two of these state cases are now pending on petition for a writ of certiorari in this Court (Pet. No. 77-983).[6] In *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677, 565 P. 2d 1151, an individual and an association of commercial non-Indian fishermen filed an original action for mandamus in the state supreme court. They

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[5]The record in *United States* v. *Washington*, W.D. Wash., Civil No. 9213, is replete with evidence of illegal non-treaty fishing and the State's unsuccessful efforts to control it. See, *e.g.*, Docket Nos. 768, 964, 968, 970, 1148, 1177, 1381, 1494, 1555, 2436, 2511, 2618, 2636, 2787, 3405, 3406, 3420, 3439, and 3945 in *United States* v. *Washington*.

[6]In addition to the decisions of which review is sought in this Court, see also *Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash. 2d 799, 567 P. 2d 205; *Grays Harbor Gillnetters Association* v. *Sandison*, Wash. Sup. Ct., No. 45144 (argued October 31, 1977); *Puget Sound Gillnetters Association* v. *Sandison*, Thurston County Super. Ct., No. 58107 (decided August 24, 1977); and *Columbia River Fishermen's Protective Union, Inc.* v. *Dixie Lee Ray*, Thurston County Super. Ct., No. 55339 (decided August 25, 1977).

requested the court to restrain the Washington Department of Fisheries from promulgating fishing regulations which, as required by the federal decision, would allocate the harvest between treaty and non-treaty fishermen. Neither the United States nor the treaty tribes were parties to the action, although they participated as *amici curiae*.

On June 9, 1977, the state supreme court issued an opinion accepting the non-Indians' arguments, though declining to issue the requested writ of mandamus.[7] The court held that, under state law, the Director of Fisheries lacked statutory authority to restrict fishing for any purpose other than conservation. 88 Wash. 2d at 681-683, 565 P. 2d at 1158-1164. Since, in the court's view, the state agency could not be compelled to act beyond its statutory authority, the court concluded that the Director had no power to enforce the Indian treaty rights by restricting non-treaty fishing. 88 Wash. 2d at 684-689, 565 P. 2d at 1154-1157. The court also stated that, even if the necessary state authority had existed, any allocation of fishing opportunity between treaty Indians and non-treaty fishermen would violate the constitutional guarantee of equal protection. 88 Wash. 2d at 684, 565 P. 2d at 1154. Declining to follow the federal courts' decisions in *United States* v. *Washington, supra*, the state court held that the treaties guaranteed to the Indians only the same

[7]The court stated that it had "full confidence that the director will abide by our decision." 88 Wash. 2d at 680, 565 P. 2d at 1154. Subsequently, the non-Indian fishing associations filed another motion for mandamus, contending that the Director of Fisheries apparently was still following the orders of the federal district court and that the writ of mandamus was thus necessary to enforce the judgment of the state court. The court heard argument on the motion on October 31, 1977, and the matter is still under submission.

opportunities to fish as are enjoyed by non-treaty fishermen. The court concluded that state regulations are thus valid only so long as they treat all fishermen alike. 88 Wash. 2d at 689-693, 565 P. 2d at 1157-1159.

In *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, 89 Wash. 2d 276, 571 P. 2d 1373, the second state case of which review is sought (Pet. No. 77-983), the non-Indian fishing associations initiated an action for declaratory and injunctive relief in the Superior Court for Thurston County, Washington. The superior court held that the challenged state regulations were invalid because they exceeded state statutory authority. On appeal, the state supreme court initially dismissed the case as moot, because the fishing season to which the regulations pertained had passed. 87 Wash. 2d 417, 553 P. 2d 113. On petition for rehearing, however, the court agreed to reach the merits and, on November 23, 1977, it issued an opinion reaffirming the conclusions it had reached in *Puget Sound Gillnetters Association* v. *Moos, supra*.

3. *Implementation of the federal court's decree.*

a. *The Washington Fishery Case.*

As the state court litigation gradually indicated that Washington would not be able to comply with the federal court's judgment, the United States and the tribes again invoked the continuing jurisdiction of the district court in *United States* v. *Washington*. During August and September 1977, that court issued a series of orders designed to protect the Indians' treaty rights (Pet. App. A-35 to A-92). By orders dated August 10 and 31, 1977, the federal court determined the treaty Indians' proper share of the 1977 harvest and expressly removed that share from the jurisdiction and control of the State of Washington (Pet. App. A-35 to A-61). The court stated

that "[j]urisdiction and harvest control over all allocations for treaty fisheries is hereby vested in this court. The defendants * * * are hereby enjoined from exercising jurisdiction or any form of harvest management, authorization or control over, or in any manner regulating, restricting, prohibiting or interfering with the taking, fishing for, possessing or disposing of, the fish comprising that portion of any run allocated by this court to the treaty fisheries * * * " (Pet. App. A-56).

This action of the federal court, undertaken "reluctantly, but necessarily" (Pet. App. A-55), was compelled by the state court rulings that the Department of Fisheries could not lawfully allocate the fish catch. Under the federal court order, the Department of Fisheries no longer was required to allocate the catch between treaty and non-treaty fishermen, because it no longer had control over the treaty Indians' share; the Department's only obligation was to ensure that non-treaty fishermen did not harvest in excess of the numbers authorized by the federal court. Even this task, however, was frustrated by the state court decisions, which effectively prevented the State from enforcing any restrictions against non-treaty fishermen. At several hearings before the federal court, the State's Assistant Attorney General acknowledged that restrictions on non-treaty fishing could be enforced only if the federal court entered an injunction running directly against the non-treaty fishermen, with violators punished through the contempt process. See, *e.g.*, *United States* v. *Washington*, Transcript of August 25, 1977, pp. 59-63;

Transcript of August 26, 1977, pp. 31-33; Transcript of August 30, 1977, pp. 20-21.[8]

Accordingly, on August 31, 1977, and September 27, 1977, the district court issued injunctions against the non-treaty fishermen, prohibiting all net salmon fishing in certain specified geographic areas except during such times and in such places as are authorized by regulations conforming to the court's prior orders (Pet. App. A-79 to A-87, A-89 to A-92).[9] The court directed the State of Washington and the United States to cite any fisherman who, having received notice of the injunction, thereafter fished illegally, and to require him to appear before the court to show cause why he should not be held in contempt (Pet. App. A-91).

The non-treaty fishermen sought review of these orders by filing a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. At approximately the same time, the State of Washington appealed from all of the district court's orders relating to the 1977 season. The court of appeals permitted the non-treaty fishermen to intervene in the State's appeals, and the appeals and the mandamus proceeding were consolidated.[10] On April 24, 1978, the court of appeals

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[8]State citations based on violations of state regulations promulgated to comply with the federal judgment are routinely dismissed by the state trial courts. See Brief of Petitioners in Support of Application for Writ of Mandamus, filed in September 1976, in *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677, 565 P. 2d 1151.

[9]The procedures for determining open fishing times and areas are specified in the injunction of September 27, 1977 (Pet. App. A-90 to A-91).

[10]These cases were also consolidated with an appeal and a mandamus proceeding seeking review of similar orders entered by the

issued its opinion in these consolidated Washington Fishery cases, in which it affirmed the district court in all respects (Pet. App. A-1 to A-28).

In its Washington Fishery decision, the court of appeals described the background against which it reviewed the district court's implementation orders (Pet. App. A-3):

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

The court then reaffirmed the validity of the district court's treaty interpretation (Pet. App. A-3 to A-9).[11] The court also rejected petitioners' contention that in allocating the 1977 harvest the district court had exceeded

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United States District Court for the District of Oregon to implement the prior decisions in *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore.), and *United States* v. *Oregon*, 529 F. 2d 570 (CA. 9)). No party to the Oregon litigation has sought review in this Court, although the court of appeals' disposition of that matter was identical to its disposition of the Washington Fishery case.

[11]In concurring opinions, Judges Wallace and Kennedy stated that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights" (Pet. App. A-28). Nevertheless, both judges considered the decision in this case to be required by the court's prior decision in *United States* v. *Washington*, 520 F. 2d 676, certiorari denied, 423 U.S. 1086.

the intent of its original decision, which called only for an equal division of fishing opportunity and did not purport to guarantee the Indians specific numbers of fish (Pet. App. A-11 to A-13). The court held that "[c]onsidered in light of the record as a whole, the orders allocate only the opportunity to take fish. That allocation can best be expressed and enforced, of course, by numbers of fish taken" (Pet. App. A-11, n. 6). The court found "no abuse of discretion in the district court's orders allocating the opportunity to take fish. * * * If the nontribal fishery were not limited, the tribal fishery would never have the opportunity to take its full share * * *. Preserving the tribal opportunity requires limiting the nontribal opportunity" (Pet. App. A-13). Finally, the court of appeals rejected the claim that an allocation of fishing rights among Indians and non-Indians pursuant to the treaties constitutes a denial of equal protection (Pet. App. A-6 to A-8). The rights of the treaty tribes are based on their historical treaty status as the successors to sovereign entities and not on their race (*ibid.*).

The court then turned to the questions of enforcement. The court affirmed the district court's injunctions against the nontreaty fishermen, holding that, even though the fishermen were not parties to the litigation, they "are in privity with the [State of Washington]" and may thus properly be bound by the district court's orders (Pet. App. A-19 to A-20). The court of appeals concluded that "the district court had authority to act against the fishers directly when it appeared that the state was unable to do so" and that the fishermen "are subject to penalties for contempt if they have actual knowledge of the court's orders and violate them" (Pet. App. A-20).

b. *The 1978 Enforcement Order.*

The State of Washington's inability to manage its fisheries and enforce regulations to comply with the federal court decisions was unchanged at the end of the

1977 fishing season. Accordingly, on June 6, 1978, the district court issued an enforcement order to govern during 1978 and subsequent fishing seasons (Pet. No. 78-139, App. C-1 to C-5). In all material respects, the 1978 Enforcement Order (which petitioners in No. 78-139 seek to have reviewed before judgment in the court of appeals)[12] is identical to the 1977 Enforcement Order reviewed and affirmed by the court of appeals in the Washington Fishery case. Like the 1977 order, the 1978 Enforcement Order enjoins all non-treaty fishing except for fishing conducted in accordance with procedures established by the court (Pet. No. 78-139, App. C-2, C-3). Violations of the court's injunction are punishable by contempt (*id.* at C-4).

c. *The International Fishery Case.*

In the original litigation in *United States* v. *Washington, supra*, the State of Washington argued that the Convention of May 26, 1930, between the United States and Canada, 50 Stat. 1355, as amended by 8 U.S.T. 1058, abolished Indian fishing rights with respect to Fraser River salmon. This Convention provides for an equal division of the catch of Fraser River salmon between Canadian and American fishermen and establishes the International Pacific Salmon Fisheries Commission to implement the agreement. 8 U.S.T. 1060. The Commission proposes regulations each year to govern the time and manner in which Fraser River salmon may be taken by the fishermen of each country. These proposed regulations become effective on approval

[12]A notice of appeal from the 1978 Enforcement Order has been filed and the matter is now pending in the court of appeals (C.A. 9, No. 78-2523). The appeal was taken only by the Washington Reef Net Owners Association, which is not a petitioner before this Court. But see note 18, *infra*.

by each nation. *Ibid.* The State of Washington customarily enacts the Commission's regulations verbatim into state law and enforces them as state law.[13]

The United States took the position that the Convention was not intended to affect the domestic allocation of fishing opportunity within the United States, and that nothing in the Convention conflicted with the tribes' rights to harvest a fair share of the United States' portion of the Fraser River fishery. Both the district court and the court of appeals agreed that the Convention with Canada neither explicitly nor implicitly repealed the Indian treaties (384 F. Supp. at 411; 520 F. 2d at 689-690). Both courts held, however, that all fishermen, including treaty Indians, must comply with the Commission regulations. *Ibid.*

Thereafter, the United States attempted, through its members on the Commission and through diplomatic channels, to have the Commission alter its regulations to permit a special Indian fishery within the United States' entitlement. Because these efforts were unsuccessful, the United States, through the Department of State, withdrew its approval of a portion of the Commission's regulations for the 1975 season (Pet. App. A-122). Following this action, the district court ordered the State of Washington to restructure its regulations (which had incorporated the

[13]Pursuant to the Sockeye Salmon Fishery Act of 1947, 61 Stat. 511, as amended, 16 U.S.C. 776 *et seq.*, the President was to designate a federal agency responsible for enforcement of the Convention and the Commission regulations. The federal agency designated by the President, the National Marine Fisheries Service, may in turn authorize the State of Washington to act as the enforcing agent. 16 U.S.C. 776d.

Commission regulations) to permit a special treaty fishery for the United States' share of the Fraser River runs (Pet. App. A-105 to A-124).[14]

The State of Washington appealed and, on April 24, 1978, the court of appeals dismissed the appeal as moot (Pet. App. A-29 to A-33). First, the court of appeals noted that the district court's order pertained only to regulations for the 1975 season and had therefore lapsed (Pet. App. A-30). Furthermore, the court determined that the case was not one "capable of repetition, yet evading review," because the International Commission regulatory system that was in effect during the 1975 season had been abandoned by the United States (Pet. App. A-31). Commencing in 1977, the United States assumed direct regulatory and enforcement control of the fishery pursuant to its authority under the Sockeye Salmon Fishery Act of 1947, 61 Stat. 511, as amended, 16 U.S.C. 776 *et seq*. See note 13, *supra*. The United States has now promulgated separate federal regulations to govern Indian fishing on Fraser River runs.[15] Since 1977, the State has neither enacted Commission regulations into state law nor had any authority to enforce such regulations.

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[14]As noted by the State of Washington (Pet. No. 78-119 at 31), the district court entered this order prior to the State Department's action. However, the district court stayed its order until the State Department advised the district court that it had withdrawn its approval of the Commission's regulations.

[15]The validity of these regulations was challenged in *Purse Seine Vessel Owners Association, et al.* v. *United States Department of State, et al.*, Civil No. C77-471M (W.D. Wash.). On July 8, 1977, the district court denied a preliminary injunction against enforcement of the regulations. By order dated September 27, 1977, the court of appeals affirmed the denial of injunctive relief (C.A. 9, No. 77-2988). The court of appeals also indicated that it would issue an opinion in the case, but has not done so to date. The merits of the case are still pending in the district court.

DISCUSSION

Many considerations argue against review by this Court of the present decisions. The issue of the fishing rights possessed by the Indian Tribes of Washington pursuant to treaties with the United States has been before the Court on many previous occasions, some very recent, and the basic principles are long since settled. The ruling of the district court is the product of a complex adjudication involving extended hearings and a massive record. In our view, the orders faithfully implement the decisions of this Court. The court of appeals has twice affirmed the basic decision and this Court has denied review. Orders embodying the same principles have been accepted by all parties in the neighboring State of Oregon. And, finally, the "conflict" in the State of Washington now urged as the primary ground for this Court's intervention results from proceedings which purported to relitigate issues finally resolved in the federal courts and which, in our view, should not have been entertained by the state courts.

In these circumstances, we would normally urge denial of the petitions for certiorari. But, whether or not it should have been allowed to happen, there is no blinking the fundamental conflict that now exists between the federal and state courts, both on the underlying treaty issue and on enforcement questions. Cf. *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 407. And, unfortunately, these differences are not of academic interest only; they have created very real practical problems.

First, the conflict of decisions has caused a grievous breakdown in the enforcement of fishery regulations. Despite the efforts of the United States and the district court, non-Indian fishing in violation of the court's decree

is rampant (Pet. App. A-83). The United States is concerned that a vital resource may be destroyed by overfishing, to the detriment of all fishermen and the local economy. If respect for the law is not soon restored, there will eventually be no salmon left for the litigants in these cases to fight over.

Second, the conflict between the federal and the state decisions has effectively prevented the State of Washington from managing its fisheries and has forced the federal district court to involve itself intimately in the day-to-day tasks of fisheries management. We believe that all parties to this litigation would prefer to see the management of the fishery returned to the state administrative entities whose familiarity and expertise in this area are unquestioned. As recognized by the court of appeals, however, the district court has been forced to assume this responsibility by the default of the State in enforcing the court's decree (Pet. App. A-3). Moreover, the state agencies cannot rectify their default while the decisions of the State's supreme court remain in effect (Pet. App. A-11).

Third, the default of the state government has required the United States to concentrate a disproportionate amount of its limited fisheries enforcement personnel on what is essentially a local enforcement problem. Agents of the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Marshals Service, and the Coast Guard have been diverted from their regular duties to assist the district court in implementing the Indians' treaty rights. This has resulted in a reduction in the federal fisheries services available for the rest of the country and for the enforcement of the ocean fisheries programs governed by the Fishery Conservation and Management Act of 1976, Pub. L. 94-265, 90 Stat. 331, 16 U.S.C. 1801 *et seq.*

It is only under compulsion of these serious difficulties that we join petitioners in inviting the Court's intervention. Only this Court can lay to rest the conflict of decisions. And, one may hope, a clear ruling from this Court will enable the State to reassume its responsibility to administer its fishery laws in a manner consistent with the rights preserved to Indian tribes by treaties of this nation.[16]

1. The central issue in these cases is the proper interpretation of the treaty language guaranteeing the tribes the "right of taking fish, at all usual and accustomed grounds and stations, * * * in common with" other Washington citizens (Pet. App. A-131). In our view, that issue has been correctly decided by the district court and the court of appeals in the Washington Fishery case. The result reached in that case is an appropriate culmination of the unbroken line of decisions by this Court recognizing the special fishing rights reserved to the tribes under these treaties. *United States* v. *Winans,* 198 U.S. 371; *Tulee* v. *Washington,* 315; U.S. 681; *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392; *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44; and *Puyallup Tribe* v. *Department of Game,* 433 U.S. 165. See, also, *Antoine* v. *Washington,* 420 U.S. 194. Under normal circumstances, we would accordingly urge that there is no need for further review of this issue by this Court at this time.

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[16]Counsel for the Puget Sound Gill Netters Association and the Purse Seine Vessel Owners Association, petitioners in No. 78-139 and respondents in No. 77-983, have authorized us to represent to the Court that, in the event the Court grants certiorari in these cases and upholds the decisions of the United States District Court and overturns the decision of the Supreme Court of Washington, the Associations will take all possible steps to secure compliance by their members with the decision of the Court. We, of course, assume that the State officials concerned will act in like manner. Indeed, we

Unfortunately, however, a majority of the Washington Supreme Court still declines to accord effective recognition to Indian fishing rights guaranteed by federal treaties. Indeed, that court has most recently held that any attempt to implement those rights by apportioning the fishery resource between treaty fishermen and others violates the Equal Protection Clause of the Fourteenth Amendment. *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson, supra.* As the dissenting justices pointed out (571 P. 2d at 1383-1386), that ruling simply ignores this Court's holding in *Puyallup II* that the steelhead fishery of the Puyallup River must be "fairly apportioned" between the two groups, 414 U.S. at 48-49, and the Court's subsequent approval, in *Puyallup III,* of an allocation of 45 percent of the natural run to the Indian fishermen. 433 U.S. at 177. Apparently, there is yet need for a further pronouncement by this Court. In the circumstances, we can only suggest an express affirmance of the decision of the lower federal courts in the Washington Fishery case to put the issue to rest.[17]

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would have expected compliance by all parties with the orders of the federal courts in this matter from the start.

[17]Neither the doctrine of *res judicata* nor law of the case would appear to prevent this Court from making a determination on the merits of the treaty issue in the Washington Fishery case. See *Mercer* v. *Theriot*, 377 U.S. 152, 153-154; *Reece* v. *Georgia*, 350 U.S. 85, 87. As stated in *Reece* v. *Georgia, supra,* 350 U.S. at 87, this Court has "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation," notwithstanding the fact that such questions became the law of the case, insofar as the lower courts were concerned, upon denial of the first petition for certiorari filed by the State. On the other hand, it is equally clear that the rationale of *Reece* v. *Georgia* in no way empowered the state courts to reach the same issues, since those courts have no jurisdiction, at any stage of the litigation, to "review" the judgments of the lower federal courts. See pp. 23-24, *infra.*

2. Like considerations, in our view, argue for granting review in the state cases as well—albeit, for several reasons, we do not believe the underlying issues should be decided in those cases and would not urge the Court to grant the petition seeking review of those decisions if the federal Washington Fishery case were not also before the Court on the merits.

We have already canvassed some of the defects of the state cases. See Memorandum for the United States as *Amicus Curiae* in No. 77-983, at 8-13. The incompleteness of the factual record and the absence of a truly adversary context are sufficient grounds for eschewing the state cases as a vehicle for deciding the basic controversy. What is more, we believe the courts of Washington should have declined to entertain actions which sought to relitigate issues already resolved, expressly or implicitly, by the courts of the United States.

It is settled that state courts must give *res judicata* effect to the judgments of the federal courts. *Stoll* v. *Gottlieb*, 305 U.S. 165, 170-172; 1B Moore's *Federal Practice*, para. 0.406[1] at 902-903 (2d ed. 1974). And that principle applies " 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U.S. 351, 352." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597. The State of Washington had a full opportunity to litigate the extent of its regulatory powers and obligations with regard to Indian treaty fishing in *United States* v. *Washington, supra.* The State was therefore precluded from relitigating that issue again in the state forum. Cf. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313.

Moreover, the private associations that sued to enjoin the state officials in the state cases (petitioners in No. 78-139) were fully represented by the State in the federal

litigation. Since the personal rights claimed by the members of the private associations are merely the rights possessed by all citizens of the State to fish "in common" with the treaty Indians (10 Stat. 1133), the judgment against the State in *United States* v. *Washington, supra*, was binding on its citizens as privies with the State. See *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 340-341. The federal judgment adverse to both the State and its citizens thus bars relitigation of the issue by these two parties against each other, as well as by either of the two against the United States. The state court should therefore have refrained from ruling on the merits in the two state cases.

Nor did the action of the state courts merely ignore principles of *res judicata*. Those courts have effectively enjoined state officials from taking action required of them by a federal district court judgment that had been affirmed by the court of appeals and had become final by denial of a petition for certiorari here. It is at least questionable whether such interference with the implementation of a final federal court decree was within the authority of the state tribunals. Cf. *Donovan* v. *City of Dallas*, 377 U.S. 408, 412-413 and cases cited at n. 11; *General Atomic Co.* v. *Felter*, 434 U.S. 12, 16. And, in any event, the federal court would probably have been justified in staying the effectiveness of the state court decrees. See *Mitchum* v. *Foster*, 407 U.S. 225, 235-237.

But, in all the circumstances, it is unprofitable to pursue the question whether the state courts should have declined the invitation to create a conflict of decisions. The fact is that state officers continue to invoke the "shield" of the Washington Supreme Court judgments in refusing to take an active role in implementing the federal court decision. Although the district judge has resorted to alternative means of enforcement, it is clearly preferable that state officers should themselves administer the

fishery. Accordingly, we urge this Court to grant the petition in the state cases in order to settle the issue whether the relevant state officials are bound to implement federal law in this matter notwithstanding the holding of the Washington Supreme Court that they would thereby be violating restraints imposed by state law.

3. In our view, the questions relating to enforcement of the district court's decrees are easily resolved once it is held that the original treaty interpretation was proper. The equitable tools used by the district court and affirmed by the court of appeals are not novel; they have been used by the federal courts repeatedly to enforce the civil rights of minorities in the face of recalcitrance by state officials and private parties. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 11-12; *Bullock* v. *United States*, 265 F. 2d 683 (C.A. 6), certiorari denied, 360 U.S. 909. Nevertheless, in the hope that this controversy may be finally resolved without years of continued litigation, we suggest that the Court should consider and decide the enforcement questions as well as the underlying question of treaty interpretation.

That result can be achieved by reviewing the enforcement orders already affirmed by the court of appeals or by granting the petition in No. 77-139 insofar as it seeks review of the 1978 Enforcement Order before judgment in the court of appeals. That order is, as previously noted, identical in all material respects to the 1977 order which has been finally reviewed and affirmed by the court of appeals and is before this Court in the Washington Fishery case. In the special circumstances of this case, however, it may be appropriate for this Court also to review the Enforcement Order presently in effect.[18]

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[18]The Court would appear to have jurisdiction under 28 U.S.C. 1254(1) even though the present petitioners did not appeal to the

4. The State's request (Pet. No. 78-119 at 28-35) for review of the International Fishery case should be denied because, as the court of appeals held (Pet. App. A-30), that controversy is now moot. The 1975 orders of the district court that are involved in the case are no longer in effect (*ibid.*). Moreover, for the reasons stated by the court of appeals (*id.* at A-30 to A-31), the controversy is not one that is "capable of repetition, yet evading review." The United States has assumed direct regulatory and enforcement control over the internal allocation of the Fraser River fishery pursuant to the Convention between the United States and Canada, *supra,* and the Sockeye Salmon Fishery Act of 1947, 16 U.S.C. 776 *et seq.*[19] The State plays no part, and has no further regulatory responsibility, in this program (see pp. 17-18, *supra*).

Nevertheless, Washington claims a continuing interest in that its Director of Fisheries is a member of the International Pacific Salmon Fisheries Commission, which implements the international Convention (Pet. No. 78-119 at 34-35). Membership on the Commission, however, is a federal, not a state, position. The instructions the Director receives from the State Department in connection with

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court of appeals. See note 12, *supra.* We assume the present petitioners, as two of the groups enjoined by the district court's order of September 27, 1977 (Pet. App. A-89, A-90), became "parties" respondent when that ruling was challenged on appeal and, accordingly, have standing to file a petition for certiorari in this Court. See *United States* v. *Bankers Trust Co.,* 294 U.S. 240, 243; *United States* v. *United Mine Workers,* 330 U.S. 258; *Youngstown Co.* v. *Sawyer,* 343 U.S. 579.

[19]As previously noted, the validity of the current system will be resolved in other pending litigation. Any party may, of course, ask this Court to review that litigation at the appropriate time.

the Commission are executed by him in his capacity as a federal representative. The fact that he also holds a state job is irrelevant. The State of Washington has no litigable interest arising from the communications engaged in between the United States and its appointed representative.

Washington also claims that the case is not moot because it raises the underlying question whether the Indian treaties guarantee the tribes the opportunity to catch one-half of the salmon runs in the State's waters (see Pet. App. A-31). But the persistence of this underlying issue does not breathe life back into the expired orders of the district court in the International Fishery case. Moreover, the underlying question of the scope of the Indian treaty rights is presented in the Washington Fishery case and the state cases. There is no need for the Court to consider the same question in the context of the moot controversy over the orders in the International Fishery case.

CONCLUSION

For the foregoing reasons, the United States does not oppose a grant of certiorari except in respect of Question 6 as set forth on page ~~5~~ 4, *supra.*

Respectfully submitted.

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